United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-7336

To be argued by
SANFORD M. LITVACK

United States Court of Appeals
For the Second Circuit

Docket No. 76-7336

JACOBSON & COMPANY, INC.,
Plaintiff-Appellee,

B
P/S

against

ARMSTRONG CORK COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT ARMSTRONG CORK COMPANY

UNITED STATES COURT OF APPEALS
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

Merrit v. Libby, McNeil & Libby, 533 F.2d 1310 (2d Cir. 1976) 17, 32

Milonas v. Amerada Hess Corp., 382 F.Supp. 415 (S.D.N.Y. 1974) 23

Mitchell v. United States Surgical Corp., 1976 Trade Cas. ¶60,879 (S.D. Ohio 1976) 23

Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir. 1974) 23

Plastic Packaging Materials, Inc. v. Dow Chemical Co., 327 F.Supp. 213 (E.D. Pa. 1971) 23, 28, 30, 31

Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973) 32

Quinn v. Mobil Oil Co., 375 F.2d 273 (1st Cir.), *petition for cert. dismissed,* 389 U.S. 801 (1967) 29

Sampson v. Murray, 415 U.S. 61 (1974) 32

San Filippo v. United Brotherhood of Carpenters and Joiners of America, 525 F.2d 508 (2d Cir. 1975) 20

Sanders v. Air Line Pilots Association, International, 473 F.2d 244 (2d Cir. 1972) 32

SCM Corp. v. Xerox Corp., 507 F.2d 358 (2d Cir. 1974) 18, 34

SEC v. Frank, 388 F.2d 486 (2d Cir. 1968) 15, 16, 17

Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970) 16, 18, 19

Semmes Motors, Inc. v. Ford Motor Co., 1969 Trade Cas. ¶72,964 (S.D.N.Y. 1969) 16, 18

601 West 26 Corp. v. Solitron Devices, Inc., 420 F.2d 293 (2d Cir. 1969) 17

Socialist Workers Party v. Attorney General of the United States, 510 F.2d 253 (2d Cir. 1974) 17

Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973) 11, 12, 14, 15, 17, 18, 19, 32

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BRIEF FOR APPELLANT ARMSTRONG CORK COMPANY

This is an appeal by defendant Armstrong Cork Company ("Armstrong") from an order entered July 13, 1976 in the United States District Court for the Southern District of New York by the Honorable Edward Weinfeld, United States District Judge, granting the motion of plaintiff Jacobson & Company, Inc. ("Jacobson") for a mandatory preliminary injunction requiring Armstrong to resume the sale of its acoustical ceiling products to Jacobson.

Statement of the Issues Presented for Review

1. Whether the lower court erred in issuing a mandatory injunction, without finding that plaintiff would probably prevail at trial, simply because it concluded that defendant would not be materially injured by the injunction.

2. Whether, in the face of Armstrong's overwhelming showing of its entirely lawful grounds for its termination of plaintiff as a contractor for Armstrong acoustical ceiling products, the District Court erred in giving any weight to plaintiff's claim that the termination was in violation of the antitrust laws.

3. Whether the lower court erred in granting a preliminary injunction in the absence of irreparable injury to plaintiff.

Statement of the Case

A. Prior Proceedings

Plaintiff filed this action on May 26, 1976, alleging, *inter alia,* that Armstrong's termination of Jacobson as an Armstrong acoustical ceiling products contractor on March 19, 1976 was accomplished in violation of the antitrust laws (A 3). Despite the fact that it had waited more than nine weeks before even seeking relief, plaintiff, on May 28, 1976, obtained an order directing Armstrong to show cause on June 15, 1976 why a preliminary injunction should not issue, compelling Armstrong to reinstate Jacobson as a contractor-distributor and to sell its ceiling products to Jacobson. The order further enabled Jacobson to depose three Armstrong employees, Phillip W. Unger, J. E. Synder and Richard C. Wiley, prior to June 15 (A 16).*

Plaintiff did not request an evidentiary hearing, and hence its motion for a preliminary injunction was heard on memoranda, affidavits and argument. On July 2, 1976, the District Court filed its opinion granting plaintiff a temporary injunction (A 538). Pursuant to the decision of the District Court, Armstrong and Jacobson agreed upon

* Page references to the Joint Appendix are prefixed "A". Page references to the transcripts of the depositions of Messrs. Unger, Snyder or Wiley are prefixed "Unger Dep.", "Snyder Dep." or "Wiley Dep."

the terms to be included in the lower court's order, except that Armstrong requested that the injunction be stayed pending its appeal and further that there be a trial on the merits within six months (A 557, 561). The order signed and filed by the District Court on July 13, 1976 did not include the provisions requested by Armstrong for a stay and prompt trial (A 563).

Armstrong appealed from the July 13, 1976 order on the same day. On the next day, Armstrong moved this Court for an expedited hearing and a stay of the District Court's order of preliminary injunction pending appeal. This Court denied the stay but granted an expedited appeal.

B. Statement of Facts

1. The Parties

Jacobson is a contractor in the business of furnishing and installing acoustical ceiling products, partitions and other building materials (A 26). It has been a contractor of ceiling products for almost 80 years (A 43).

Armstrong manufactures, among other things, acoustical ceiling products, which it sells through designated contractors, as opposed to selling to anyone who might request them. These contractors assist in promoting Armstrong products and undertake the often complex task of converting Armstrong product specifications into installed acoustical ceilings (A 293-294).

2. The Commencement of Jacobson's Contractor-Distributorship

Prior to 1968 Jacobson and Armstrong had no business dealings with each other. Jacobson was, however, known to Armstrong at that time as a company engaged for more than 70 years as a ceiling contractor (A 448). Thus, when Jacobson approached defendant's Northeast Regional Of-

fice* in March of 1968 requesting that it become an Armstrong contractor for acoustical ceiling system products in New York City, Long Island, Westchester and Rockland Counties in New York, Fairfield County in Connecticut, and Northern New Jersey, Armstrong was agreeable (A 294-95, 416, 448). After its Armstrong appointment, Jacobson, like most Armstrong contractors, continued to sell all of its pre-existing competing product lines (A 295, 449).

At the time of its appointment, Jacobson had office facilities in Philadelphia, and between 1968 and 1970 Jacobson expressed several times its desire also to deal directly with Armstrong's office in the Mid-Atlantic Region, which encompasses the Philadelphia area. Armstrong felt it already had full and excellent representation in that area and therefore declined. Jacobson repeated its request periodically from 1968 to 1970, but Armstrong maintained its position. (A 296, 408-09, 449-50). Jacobson, however, was completely free to sell Armstrong products in the Philadelphia area during that time (A 450).

In mid-1970, Jacobson informed Armstrong that it was closing its Philadelphia office; that it would thereafter be supplying both the Philadelphia area and the New York area from a single warehouse in Elizabeth, New Jersey; and that the warehouse consolidation made it desirable for it to ship Armstrong acoustical ceiling products into the Philadelphia area, which it planned to do (A 296, 327-30, 410). Armstrong told Jacobson that it had the right to

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* Armstrong has nine such regions: Northeast, Middle Atlantic Southeast, Southwest, Central East, Central Midwest, Pacific West and Northwest (Unger Dep. 10). The two pertinent to this lawsuit are the Northeast Region, which has its office in Saddle Brook, New Jersey, and the Middle Atlantic Region, which has its office in Wayne, Pennsylvania, a suburb of Philadelphia. The Northeast Region encompasses New York, Northern New Jersey, Erie, Pennsylvania, Connecticut and the New England states (A 416). The Middle Atlantic Region encompasses the rest of Pennsylvania, Delaware, Maryland, Virginia, parts of West Virginia and Ohio, and Southern New Jersey (A 407).

do this, and Jacobson did in fact bid on projects in Philadelphia, obtaining special off-list pricing from Armstrong's Northeast Regional Office in Saddle Brook, New Jersey in order to do so (A 327-30, 419).* The record is also undisputed that the Saddle Brook office provided Jacobson with backup and services in connection with Jacobson's installation work in the Philadelphia area,** and in those instances where that office felt it necessary, it called upon Armstrong's Philadelphia office for assistance (A 419-20, 408).***

3. *The Termination of Jacobson as an Armstrong Contractor*

From Jacobson's acceptance as an Armstrong contractor in 1968 through the early 1970's, it was an aggressive contracting operation: it had four offices, in New York City, Plainview, Long Island, Elizabeth, New Jersey and Cherry Hill, New Jersey, and two warehouses, in Plainview and Elizabeth; and it had a commissioned sales force numbering over 20 (A 416-17, 448). The picture was far different at the time of termination.

* While each contractor is furnished Armstrong's price lists by mail from Armstrong's headquarters in Lancaster, Pennsylvania, the contractor contacts its regional office to obtain special off-list prices for "big jobs" upon which the contractor desires to bid. The regional office, in turn, obtains the applicable off-list prices from Lancaster, the Lancaster office being the only office empowered to authorize and formulate off-list prices, and relays the information back to the contractor. Thus, no matter where a contractor is located, and no matter where the job in question is located, each inquiring contractor would receive from its own regional office, via Lancaster, an identical off-list price for any job (A 297-98).

** The contractor's regional office also provides any servicing needed by a contractor. When the job site is outside the territory encompassed by the contractor's regional office, that regional office is still responsible for servicing, but it may, in its discretion, call on the regional office closest to the job-site for servicing assistance (A 298-99).

*** Mr. Snyder, Manager of Armstrong's Mid-Atlantic Regional Office located outside of Philadelphia, listed many specific jobs on which his office provided on-the-job servicing for Jacobson (A 408).

Beginning in 1973, Jacobson began to reduce its efforts as a full-line contractor by ignoring all but very large jobs, which are less profitable to Armstrong (A 303, 417).* Jacobson refused to bid renovation work, an area of growing significance to Armstrong in the New York City area in the last few years, and ignored smaller jobs, even where a specification was developed solely for Armstrong material (A 417-18).

Accompanying the drastic change in Jacobson's bidding were severe cutbacks in its organization. Between 1973 and 1975, approximately fifteen of its twenty sales employees were either fired or laid off. The Cherry Hill, Plainview and New York City offices were closed in succession, and the Plainview warehouse was closed. At the remaining Elizabeth, New Jersey warehouse only one individual was left, and he was involved only in wholesaling. (A 417-18).

The effect of the change in bidding and structural cutbacks upon Jacobson's sales was predictably devastating. Jacobson's decline in ceiling purchases during the 1974-75 period was the sharpest of any of Armstrong's major contractors in the New York area (A 305). Jacobson's 1975 purchases were half what they were in 1973 (A 303). Much more important, its anticipated sales in 1976 and future years would be minimal compared to its purchases in past years; Jacobson was simply not bidding and closing jobs which would result in purchases of product in the years to come (A 303-04).** Moreover, the bulk of its drastically

* Because Armstrong gives off-list prices for large jobs and because more contractors bid on large jobs, decreasing the possibility of an Armstrong award, large jobs are less profitable to Armstrong than smaller jobs (A 303).

** There is as much as a two year backlog between a bid or contract award closing and consequent purchases from that job. Thus, Jacobson's failure to bid in 1974-1975 would not be fully evident in its sales figures until 1976-1978. Conversely, its 1974 and 1975 orders and sales, to which plaintiff continually refers, represent jobs closed up to several years ago (A 303; Snyder Dep. 126).

reduced purchases from Armstrong was for its wholesaling operation, when what Armstrong needed and wanted was an expert and aggressive contractor (A 428).

Understandably, this cutback in Jacobson's business was a source of serious concern to Armstrong and thus became a focal point of conflict between the manufacturer and contractor (A 344-69). Armstrong, for its part, criticized the Jacobson organization on numerous occasions for their lack of pursuit of anything but the largest jobs (A 418). Jacobson's dogmatic reply was that it had no interest in changing and that it would continue not to pursue the spectrum of jobs, but only "big ticket items" (A 418). Indeed, as the lower court noted, as early as the spring of 1975, Armstrong personnel called for Jacobson's termination (A 346, 547).*

Apart from the changes in its staff and the refusal to bid smaller jobs, a number of other differences developed between the parties, and relations between Armstrong and Jacobson deteriorated to the point that Armstrong considered any kind of a normal business relationship impossible (A 307-16). For instance, by the end of 1974, Jacobson's complaints in dollars as a percentage of ceiling sales were running at a rate of six times Armstrong's national average (A 307). Since Jacobson's practice is to withhold portions of the payment due Armstrong if it has claims, the upshot has been that Jacobson was holding thousands of dollars of Armstrong's money while the parties argued about the claims (Wiley Dep. 38-41). As the District Court

* Plaintiff does not dispute these basic facts but contends instead that its performance was not bad when compared to other contractors. This argument misses the point. Jacobson covers triple the area of any other Armstrong Northeast regional contractor, and its sales, office and personnel simply cannot be compared in this context against the others (A 516-17; Unger Dep. 59). Furthermore, the undisputed deposition testimony and documentary evidence show that in the year prior to its termination, Jacobson did not land a single job in New Jersey and closed only one job in New York, the Texaco building in Purchase, New York (A 360; Wiley Dep. 26-27).

recognized, "much of the friction between the parties resulted from Jacobson's frequent complaints about Armstrong's products, misinterpretation of specifications and other matters" (A 547-48).

Furthermore, Armstrong was concededly upset at Jacobson's practice, increasing in frequency, of asking Armstrong to undertake the complicated job of calculating an off-list price on a large complex building such as a GSA office building* and then bidding non-Armstrong products, using the knowledge of Armstrong's price only to undercut other Armstrong bidders (A 314-16). In addition, Jacobson ran advertisements suggesting that it had received special price breaks from Armstrong, when, in reality, Jacobson was selling old inventory and simply not saying so (A 312-13). This was just too much for Armstrong, and by March 1976, the plain truth is that Armstrong felt it had had enough.

In short, when Jacobson was an aggressive Armstrong contractor, the company could tolerate some inconvenience and annoyance. But with Jacobson no longer a significant competitive factor in the industry as a contractor, Armstrong decided the time had come to sever the relationship (A 301-16). The parties had lived without each other for 70 years, and so, despite the litigation-oriented claims, it seemed reasonable to believe they could do so again. Thus, Armstrong terminated Jacobson as a contractor, effective March 19, 1976.**

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* These projects involve complicated performance specifications covering acoustics, lighting, fire-ratings, flexibility, etc., requiring Armstrong to develop a detailed technical proposal for the contractor desiring to bid the project (A 314).

** Consistent with its normal policy, to avoid unnecessary injury to Jacobson's business and the concomitant litigation for breach of contract which might be expected to arise from it, Armstrong unilaterally offered in its termination letter to fulfill Jacobson's commitments to supply Armstrong products outstanding as of the termination date (A 292).

4. Jacobson Has Not Been Irreparably Damaged

The record establishes beyond all doubt that Jacobson had not suffered and would not suffer irreparable damage by reason of its termination. To the contrary, the following facts have been clearly established:

(a) Before it became an Armstrong contractor in 1968, Jacobson flourished and built up its ceilings business for almost 80 years wholly on the basis of non-Armstrong products (A 25, 43, 316).

(b) Jacobson's moving affidavit stated that in the last few years its revenues from completed jobs have generally exceeded $12 million a year (A 26). Yet, its own figures for its purchases from Armstrong were only $605,000 for 1975 and $860,764 for 1974 (A 38), indicating that, all Jacobson's representations to the contrary notwithstanding, the vast majority of its revenues comes from either selling other manufacturers' ceiling products or from other businesses. Assuming Jacobson uses a 100% markup, by its own figures Armstrong only accounts for 10% of its sales.

(c) While an Armstrong contractor, Jacobson continued to promote and sell the lines of other ceiling products manufacturers besides Armstrong (A 316). Jacobson's affidavit shows that last year it sold the ceiling products of many different manufacturers (A 286). As the District Court noted, Jacobson is "a full service supplier, with access to the material of all leading manufacturers" (A 552).

(d) Armstrong sells well under 35% of all acoustical ceiling products nationally, and its percentage in the New York area and in Northern New Jersey is considerably less than the national average (A 317). There are many other lines of acoustical ceiling products, including, among others,

Celotex, U.S. Gypsum, Conwed and Owens-Corning, all of which are available to, and are utilized by, Jacobson (A 316). These competitive lines are comparable to Armstrong in both quality and in breadth, and indeed, some of them have products that Armstrong lacks (A 316-17).

(e) Given the choice between Armstrong or a competitor's products, Jacobson has often chosen the latter. As illustrations, on a New York Foley Square job in 1973 and on an Atlanta federal office building in 1976, although Jacobson asked for and received off-list Armstrong quotes, it submitted its bid on the basis of competitors' products (A 314-16). And, on the Texaco job in Purchase, New York in 1976, Jacobson got Armstrong to lower its price by stating it would otherwise switch to U.S. Gypsum products (A 420-21).

(f) Over 90% of ceiling specifications written in the Northeastern and Mid-Atlantic Regions of the United States, and almost all specifications on government projects and most large non-government projects, specify at least two and usually more competitive products (A 316, 318). Since Jacobson now concentrates solely on larger jobs, it would almost never encounter a specification that would specify only an Armstrong ceiling product (A 318).

(g) In the rare instances (5-8% of total specifications for ceilings on commercial buildings) when an Armstrong or a competitive "proprietary" product is specified, the architect will nonetheless usually consider the substitution of a comparable product if requested by the contractor, and the breaking of a "proprietary" specification in this manner occurs in approximately 60-70% of all cases specifying proprietary products (A 317-18).

(h) There have always been and there presently are many ceilings contractor-distributors in the Northeastern United States that do not carry the Armstrong line, but

nevertheless have competed successfully with Jacobson and Armstrong's other contractors (A 318).*

(i) A major aspect of Jacobson's business now is admittedly its wholesaling "Supply Center" (A 35), and there are at least 150 similar ceiling supply centers across the country, none of which carry Armstrong products, but which nevertheless are apparently thriving (A 319).

(j) Jacobson's termination did not preclude it from obtaining Armstrong acoustical ceiling products; it began to purchase Armstrong ceiling products from another Northeast Regional Armstrong contractor (A 559).

ARGUMENT

POINT I

The District Court's order of a mandatory preliminary injunction was based on a misconstruction of the applicable law of this Circuit.

The issue on this appeal is whether Jacobson's showing below was sufficient to support the grant of the extraordinary remedy of a mandatory preliminary injunction. Judge Weinfeld, finding applicable the rule announced in *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973), concluded that, while Jacobson had not made "a compelling case of probable success on the merits," it had made "a clear showing of sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships that tips decidedly in its favor" (A 549, 553). Hence,

* Just a few which are mentioned in various Armstrong territorial reports in the record are: Special Section, Gilbert Phillips, Prince and Melen in New York; and Acoustics, Inc., Acoustical Specialties, Inc., O.C.F. Supply and J.B. Eurell in New Jersey (A 426, 432).

the District Judge granted a preliminary injunction compelling Armstrong to resume selling its products to Jacobson.

In ruling as it did, the District Court committed two basic errors of law. First, it disregarded the rule in this Circuit that a greater showing is required for the mandatory injunction sought and granted below than for a preliminary injunction in the ordinary prohibitory form. Second, in applying the *Sonesta* rule, which it believed dispositive of the motion, the District Court misconstrued the controlling decisions of this Court and granted a preliminary injunction on conclusions insufficient as a matter of law to support its action. Accordingly, we respectfully submit, the lower court's order should be set aside.

A. A Mandatory Injunction Should Not Issue Absent an Exceptional Showing

There is no question but that the injunctive order here is mandatory, requiring Armstrong to resume a business relationship severed nine weeks before the action commenced and four months before the preliminary injunction issued. Although the District Court has the power to issue a mandatory preliminary injunction in a proper case, this power must be "sparingly exercised." 7 J. Moore, Federal Practice ¶65.04[1] at 65-38 (2d ed. 1975). The rule in this Circuit is a stringent one:

> It is elementary that a preliminary injunction is designed to preserve the subject in controversy in its then-existing condition. It is also equally well known that courts are more reluctant to grant a mandatory injunction than a prohibitory one and that generally an injunction will not lie except in prohibitory form. Such mandatory injunctions, however, are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury

complained of is capable of compensation in damages. *Clune* v. *Publishers' Association*, 214 F. Supp. 520, 531 (S.D.N.Y.), *aff'd on the opinion below*, 314 F.2d 343 (2d Cir. 1963).

In this case the District Court seems to have acknowledged the *Clune* rule when it referred to "[t]he court's usual reluctance to issue a mandatory injunction . . ." (A 553). However, the Court went on to hold that the "reluctance . . . disappears in the absence of any real harm to the defendant and the need to restore the status quo pending final resolution . . ." (A 553). This reasoning, we respectfully submit, deviates too far from the established principle. The office of a preliminary injunction is "to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied *when the suit began*," *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953) (emphasis added), not to "restore" a status which had long since ceased to exist.* Moreover, the determinative factor in *Clune* is not the degree to which a mandatory injunction will injure the party enjoined but rather whether the moving party has made a compelling showing of "extreme or very serious damage" which cannot be compensated by a monetary award.

In applying the test it did here, the District Court reversed the established procedure and created a standard by which a mandatory injunction may be granted upon a showing that its issuance would not unduly harm the defendant. This new test is, we submit, both legally and logically unsupportable. There can be no serious question but that the grant or denial of an injunction *pendente lite*

* Judge Weinfeld justified his determination on this point by the fact that, in terminating Jacobson as an Armstrong contractor, Armstrong unilaterally undertook to fill orders for commitments in Armstrong products that Jacobson had made up to the date of his termination. However, Armstrong's continuation with Jacobson to such a limited extent hardly supports a direction that Armstrong resume and prolong a full-scale business relationship with Jacobson during the pendency of this action.

injures in some way the losing party on the motion. Hence, the issue with respect to a mandatory order cannot be whether there is harm or even whether the balance "tips" one way or the other, but rather whether the moving party has shown the extreme and irreparable harm necessary to support the extraordinary relief sought. Applying that standard, it is clear that the injunction here was improvidently granted.

B. The District Court Misapplied the *Sonesta* Rule

Apart from the question whether the Court properly considered the mandatory nature of the injunction and the special standards which apply, the opinion reflects that the Court erred seriously both in its construction of the *Sonesta* test and in the analysis that led it to conclude that Jacobson had satisfied what it supposed the test to be. Under *Sonesta* a preliminary injunction may issue only on

> "a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief." 483 F.2d at 250.

In concluding that Jacobson had satisfied the second alternative in *Sonesta* on a record which the Court itself found left the factual assertions of the parties on the merits in equipoise, the District Court again proceeded upon the erroneous preconception, earlier noted, that unless Armstrong, the defendant, established beyond "substantial doubt" that it had terminated Jacobson for valid business reasons, a preliminary injunction should issue in the absence of a showing by Armstrong of serious injury. This fundamental disregard of the burdens plainly imposed on the movant by *Sonesta* infects the ruling below both in its evaluation of the record and in its conclusions of law on the merits under the second branch of the *Sonesta* test.

The District Court did not find that Jacobson had established that Armstrong had terminated it for reasons forbidden by the antitrust laws. Rather, from the affidavits submitted by Jacobson and Armstrong the Court found that the reason for the termination of Jacobson as an Armstrong contractor "is in sharp dispute" and "on the instant record remains a matter of substantial doubt." The Court noted that "[p]erhaps" the termination had occurred, as Armstrong contended, because of Jacobson's declining sales and the " 'deteriorating relationship' between the parties," but that the "possibility remains" that the termination had occurred because of "Jacobson's aggressive resale policies and its continued insistence upon selling wherever and to whomever it pleased" (A 548-550). From this Judge Weinfeld concluded that Jacobson had raised "questions going to the merits so serious, substantial, difficult and doubtful . . ." *Hamilton Watch Co.* v. *Benrus Watch Co., supra,* at 740, as to warrant issuance of the preliminary injunction (A 549). The conclusion the District Court reached did not satisfy either branch of the *Sonesta* test.

The requirement that the movant raise "questions . . . so serious, substantial, difficult and doubtful" under *Hamilton Watch* cannot be met by simply leaving unresolved, without an evidentiary hearing and findings of fact, the commonplace factual issues raised below. The "questions" spoken of in *Hamilton Watch,* where the District Court had held an evidentiary hearing and made detailed findings of fact, are those factual imponderables which cannot be resolved with complete certainty on a pretrial motion, even with an evidentiary hearing, and must be reserved for final determination at a trial on the merits. *SEC* v. *Frank,* 388 F.2d 486, 490-491 (2d Cir. 1968). That category does not include the simple and crucial factual dispute about Armstrong's intent in terminating Jacobson, which was sharply drawn in the affidavits below and could easily and properly have been resolved at an evidentiary hearing. *See Herbert Rosenthal Jewelry Corp.* v. *Grossbardt,* 428 F.2d 551, 554-555 (2d Cir. 1970).

Here, Jacobson, which had the burden of making a sufficient showing, and the District Court (A 542 n. 10) were content to rely on speculative inferences to be drawn from Jacobson's affidavits, which were directly contradicted by affidavits from the Armstrong employees with personal knowledge of the facts. These contested factual issues, resolution of which was indispensable to any forecast of the outcome at trial, or, indeed, conclusion about the merit of the application, were left undetermined by the District Court without the evidentiary hearing which Jacobson concededly did not seek (A 493-94). Where, as here, there was nothing particularly urgent in the application,* and "where everything turns on what happened and that is in sharp dispute," *SEC* v. *Frank, supra,* at 490-493, a temporary injunction should not issue, absent an evidentiary hearing and a preliminary resolution of the factual issues in favor of the movant. *SEC* v. *Frank, supra; Dopp* v. *Franklin National Bank,* 461 F.2d 873, 879 (2d Cir. 1972); *Carter-Wallace, Inc.* v. *Davis-Edwards Pharmacal Corp.,* 443 F.2d 867, 872 n.5 (2d Cir. 1971).**

* The complaint was filed May 26, 1976, over nine weeks after Armstrong had terminated Jacobson as a contractor. The order to show cause bringing on the motion for a preliminary injunction was obtained May 28, 1976, returnable June 15, 1976, over two weeks later. Jacobson did not apply for a temporary restraining order.

** Judge Weinfeld thought that an evidentiary hearing might be dispensed with on the authority of *SEC* v. *Frank, supra,* and *Semmes Motors, Inc.* v. *Ford Motor Co.,* 429 F.2d 1197, 1204-1205 (2d Cir. 1970), because "the inquiry . . . turns not so much on the basic facts but on evaluating the inferences reasonably to be drawn therefrom." (A 542 n.10). The very authorities relied on establish that this view was erroneous. In *Semmes* the District Court, in a context similar to that here, was chided for its failure to heed the teaching of *SEC* v. *Frank, supra,* on this point, despite its elaborate findings of fact based on the affidavits, *Semmes Motors, Inc.* v. *Ford Motor Co.,* 1969 Trade Cas. ¶72,964 (S.D.N.Y. 1969). Moreover, since the basic factual issue here was, as the Court put it, "in sharp dispute," it is hard to see how the preliminary step of resolving it could be avoided by a second step—drawing inferences—dependent on completion of the first.

In the instant case the acceptance of plaintiff's factual premise was particularly crucial to sustaining its claim for preliminary relief. Jacobson's failure to request such a hearing and to secure such a determination left a record on which no favorable conclusion was or could be reached of the validity of Jacobson's sharply challenged and speculative assertions. In these circumstances, the grant of preliminary injunctive relief was clearly error. *Dopp* v. *Franklin National Bank, supra,* at 879; *Socialist Workers Party* v. *Attorney General of the United States,* 510 F.2d 253, 254 n.3, 257 (2d Cir. 1974); *601 West 26 Corp.* v. *Solitron Devices, Inc.,* 420 F.2d 293 (2d Cir. 1969); *SEC* v. *Frank, supra. See also Merrit* v. *Libby, McNeil & Libby,* 533 F.2d 1310, 1313 (2d Cir. 1976). Indeed, were the rule otherwise, any party seeking preliminary injunctive relief could discharge its duty under the first branch of the *Hamilton Watch* test with affidavits showing that its complaint stated a claim and that its opponent might not be entitled to summary judgment. Obviously, obtaining a preliminary injunction is not and should not be that easy; it is still the exception and not the rule to grant one.

In point of fact the District Court erred in this case because it concluded that it did not have to find a likelihood in any degree that Jacobson would prevail on the merits at trial. Rather, the Court supposed that the showing on the merits required under the second branch of the *Sonesta* test was satisfied by contested assertions in the moving affidavits which left the reason for Jacobson's termination "in substantial doubt." However, this was not sufficient to sustain a preliminary injunction, for even under a liberal construction of the second branch of the *Sonesta* test, the Court was required to find a likelihood that Jacobson would prevail at trial. The only finding touching on this subject was to the contrary (A 549).

The second branch of the *Sonesta* test applied by the District Court here traces its origins directly to *Hamilton*

Watch Co. v. *Benrus Watch Co., supra,* through *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co.,* 476 F.2d 687, 692-693 (2d Cir. 1973), *Checker Motors Corp.* v. *Chrysler Corp.,* 405 F.2d 319, 323 (2d Cir.), *cert. denied,* 394 U.S. 999 (1969), *Dino DeLaurentiis Cinematografica, S.p.A.* v. *D-150, Inc.,* 366 F.2d 373, 374-375 (2d Cir. 1966), and *Unicon Management Corp.* v. *Koppers Co.,* 366 F.2d 199, 204-205 (2d Cir. 1966). While the *Hamilton Watch* formulation of the rule seems to provide greater flexibility in some cases than the first *Sonesta* test, nothing in *Hamilton Watch* or its progeny suggests that the traditional requirements for equitable relief, a likelihood of success on the merits and irreparable injury, are dispensed with. To the contrary, a reading of the cases demonstrates that a showing of probable success on the merits remains necessary under *Hamilton Watch* as well, except in the truly extraordinary case where the irreparable harm to the movant is so substantial that a lesser showing might sometimes be allowed.

This much is clear from the cases relied on and misapplied by Jacobson and the District Court below. In *Semmes Motors, Inc.* v. *Ford Motor Co., supra,* where, in contrast to this case, the District Court had found that the plaintiff would probably prevail at trial,* this Court reviewed the showing on the merits under a less exacting standard than had previously been applied. But in that case, as is usually true in automobile franchise cases, it was undisputed that Ford's termination of Semmes Motors as a distributor meant the "extinction" of Semmes' business since all Semmes Motors sold was Ford cars. *Engine Specialties, Inc.* v. *Bombardier Ltd.,* 454 F.2d 527, 531 (1st Cir. 1972); *SCM Corp.* v. *Xerox Corp.,* 507 F.2d 358, 363 n.5 (2d Cir. 1974). Here Jacobson makes no claim that it sells only Armstrong products or that the termination of

* *Semmes Motors, Inc.* v. *Ford Motor Co.,* 1969 Trade Cas. ¶72,964 at 87,748 (S.D.N.Y. 1969).

its Armstrong contractorship means that it will go out of business. In contrast, in *Interphoto Corp.* v. *Minolta Corp.*, 295 F.Supp. 711, 717, 722, 723 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969), *McKesson and Robbins, Inc.* v. *Charles Pfizer & Co.*, 235 F. Supp. 743, 746, 751 (E.D. Pa. 1964), and *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962), each of which involved a termination of business by one manufacturer with a wholesaler of the products of a number of manufacturers, the courts involved believed they had to find and did find, despite showings of injury greatly exceeding Jacobson's here (*see infra* at pp. 35-36), that probable success on the merits at trial had been established by the movants. Thus, the demarcation line between cases in which probable success on the merits must be shown and others in which something less may suffice lies between situations where the termination means the end of the movant's business and those where its impact is not as great. At most this case falls into the latter category.

The District Court's assumption that the *Hamilton Watch* standard routinely dispenses with a showing of probable success on the merits ignored specific holdings of this Court to the contrary. *E.g.*, *Hoh* v. *Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974) (Friendly, J.); *Chicago, Rock Island and Pacific Railroad Co.* v. *Switchmen's Union of North America*, 292 F.2d 61, 70 (2d Cir. 1961) (Friendly, J.), *cert. denied*, 370 U.S. 936 (1962). In cases where the irreparable injury shown has been less that what was uncontested in *Semmes Motors*, this Court has reversed preliminary injunctions for want of a showing of probable success on the merits. *Dopp* v. *Franklin National Bank*, *supra*, at 878; *International Container Transport Corp.* v. *New York Shipping Association*, 426 F.2d 884 (2d Cir. 1970). Indeed *Sonesta* itself, as well as *Gulf & Western*, reviewed the conclusions below in terms of probable success on the merits and not some lesser standard, despite the ir-

reparable injury inherent in the impossibility of "unscrambl[ing] the eggs" in tender offer cases and the obvious harm, if plaintiffs' claims had any substance, of massive fraud on the public.

In sum, it is clear, we submit, that the conclusions the District Court reached were inadequate to support its grant of relief. First, the "questions" that it perceived existed only because no evidentiary hearing was held or findings of fact made. And second, the finding of a likelihood of success on the merits, which the District Court felt it could not make on the record before it, was indispensable to the grant of relief. For these reasons the order below must be reversed.

POINT II

The record does not support the District Court's action.

An examination of the record clearly demonstrates that, whatever the test used below, the District Court erred in concluding, first, that Jacobson had raised an issue of substance about the legality under the Sherman Act of its termination as an Armstrong contractor and, second, that Jacobson had shown irreparable injury and a balance of hardships tipping decidedly in its favor. Because the application below was heard entirely on affidavits and no evidence was taken in open court, the standard of review in this Court is not whether, on the record before it, the District Court abused its discretion. Rather "this Court is able to exercise its discretion and review the papers *de novo.*" *San Filippo* v. *United Brotherhood of Carpenters and Joiners of America,* 525 F.2d 508, 511 (2d Cir. 1975); *Dopp* v. *Franklin National Bank, supra,* at 878-879; *Diversified Mortgage Investors* v. *U.S. Life Title Insurance Co.,* Dkt. No. 75-7428 (2d Cir., June 30, 1976), slip op. at 4545.

A. Jacobson Did Not Raise Serious or Substantial Questions as to the Existence of a Violation of the Antitrust Laws

Any questions raised by Jacobson as to the existence of a violation of the antitrust laws were neither serious nor substantial. To the contrary, the record below overwhelmingly establishes that Armstrong did not in any way restrict the resale of Jacobson's purchases. Moreover, as a matter of law, there is a lack of evidence in the record as to the existence of a "contract, combination or conspiracy."

1. The Record Shows That Armstrong Did Not Improperly Restrict the Resale of Jacobson's Purchases

The opinion below analyzed three aspects of Jacobson's relationship with Armstrong relied upon by Jacobson to support its claims of violation of the antitrust laws: (a) resistance Jacobson claims to have encountered in 1970-72 in attempting to sell Armstrong products in the Philadelphia area; (b) sales in the fall of 1975 of Armstrong products at Jacobson's Supply Center in Elizabeth, New Jersey and a supposed "complaint" by Berger Acoustical Inc. ("Berger"), an Armstrong Mid-Atlantic Region contractor, in response to those sales; and (c) Jacobson's a[illegible]d difficulties in February 1976 in bidding on a federal o[illegible] building in Atlanta, Georgia. However, the overwhelming evidence as to each of these facets of the Armstrong-Jacobson relationship belies Jacobson's claims.

(a) Jacobson's Sales in Philadelphia

The District Court correctly determined that the distributorship arrangement between the parties did not restrict Jacobson from selling Armstrong products outside its designated areas of primary responsibility (A 539-40). In addition, it is uncontested that Armstrong on many

occasions acknowledged plaintiff's right to do business in Philadelphia (A 542). While Jacobson concedes this to be so, it claims, citing two isolated incidents occurring in 1971-72, that Armstrong refused to quote prices or to provide technical assistance to Jacobson from Armstrong's Philadelphia office, thereby supposedly preventing Jacobson from selling Armstrong products in the Philadelphia market.*

The plain fact is, however, that the affidavits submitted below** show that while Armstrong refused, as was its right, to permit Jacobson to deal with its Mid-Atlantic Regional Office in Philadelphia, it at all times, in its actions as well as its words, recognized Jacobson's right to sell Armstrong products anywhere Jacobson chose to sell, including Philadelphia. The documentary record establishes this point.

The affidavit of Phillip W. Unger, General Sales Manager of the Architectural Ceilings Division of Armstrong, stated unequivocally that Armstrong contractors are not restricted in any way, shape, manner or form, from doing business anywhere they choose (A 296).*** The affidavit of Richard C. Wiley, manager of Armstrong's Northeast

* Jacobson's affidavit stated that it had trouble obtaining off-list prices on jobs in Penn Grove and Allentown, Pennsylvania in 1971-1972. Neither Mr. Wiley nor Mr. Snyder could recall any job in Penn Grove (Wiley Dep. 205-06; Snyder Dep. 41), but even assuming *arguendo* the accuracy of these allegations, these two incidents are the only examples Jacobson could point to during its eight year relationship with Armstrong where it had any difficulty obtaining an off-list price for any job.

** The affidavits referred to are those of Messrs. Phillip Unger, General Sales Manager of the Architectural Ceilings Division of Armstrong, James M. Goodwillie and Richard C. Wiley, Managers of Armstrong's Northeast Regional Office and J. E. Snyder, Manager of Armstrong's Mid-Atlantic Regional Office.

*** Mr. Unger catalogued numerous recent examples of Armstrong contractors selling outside the area covered by the regional office with which they dealt (A 326).

Regional Office, stated that Jacobson frequently sold outside its region (A 419-20). Armstrong did, for administrative reasons, require that every contractor, including Jacobson, deal with the regional office through which it was initially designated an Armstrong contractor (A 297-98). Each such regional office then is responsible for the paper work involving its contractors; for providing its contractors with off-list prices for big jobs; and for servicing the jobs of its contractors once in progress (A 297-99).* However, in this regard, the record before the District Court overwhelmingly shows that Armstrong's Northeast Regional Office at all times provided Jacobson with off-list prices and other related services without regard to the geographical location of the Jacobson job.**

Moreover, even if plaintiff had adduced evidence to support its charges of having been denied required technical and other assistance in 1971-72, its antitrust claims as to the termination in 1976 could not rest upon proof of isolated incidents occurring more than five years earlier. *E.g., Mullis* v. *Arco Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974); *Milonas* v. *Amerada Hess Corp.*. 382 F. Supp. 415 (S.D.N.Y. 1974); *Plastic Packaging Materials, Inc.* v.

* Clearly, it is not unlawful to require as an administrative matter that Jacobson obtain its off-list prices and be serviced primarily from Armstrong's Northeast Regional Office in Saddle Brook, New Jersey. *See, e.g., GTE Sylvania Inc.* v. *Continental T.V., Inc.*, 1976 Trade Cas. ¶60,848 (9th Cir. 1976); *World of Sleep, Inc.* v. *Stearns & Foster Co.*, 525 F.2d 40 (10th Cir. 1975); *Mitchell* v. *United States Surgical Corp.*, 1976 Trade Cas. ¶60,879 (S.D. Ohio 1976); *Plastic Packaging Materials, Inc.* v. *Dow Chemical Co.*, 327 F. Supp. 213 (E.D. Pa. 1971); *Carter-Wallace, Inc.* v. *United States*, 449 F.2d 1374 (Ct. Cl. 1971).

** In his affidavit, Mr. Wiley refuted in detail the falsity of the assertion that his office failed or refused to quote prices on and service Jacobson's Philadelphia jobs (A 419-20). Mr. J. E. Snyder, Manager of Armstrong's Philadelphia office, confirmed in his affidavit the many times his office has aided Jacobson in connection with Jacobson contracts in the Philadelphia area (A 408).

Dow Chemical Co., supra, at 226. Indeed, the District Court expressly noted that the "... plaintiff does not contend that there is a direct nexus between its attempts to bid jobs in Philadelphia in 1970-1972 and its termination in 1976 ..." (A 543). Thus, not only was there no factual support for Jacobson's charge, but even if supported in fact, this charge plainly could have no causal relation to the termination.

(b) The Supply Center

The second aspect of the Armstrong-Jacobson relationship which Jacobson relied on to support its charge below concerned sales of Armstrong products at Jacobson's Supply Center in Elizabeth, New Jersey. At the Supply Center Jacobson sells to institutions, such as hospitals and schools, which purchase ceiling materials on a non-installed basis to reduce costs (A 312). With absolutely no support in the record, Jacobson speculated that Armstrong did not like it discounting from Armstrong's prices to its contractors and that the termination was a reaction to a complaint from another contractor about these discount sales.

Jacobson's only "evidence" as to this second charge consisted of its misinterpretation of handwritten notations by two Armstrong employees annexed to a copy of an October, 1975 Jacobson Supply Center advertisement (A 313-14), and a flagrant mischaracterization and taking out of context of Mr. Snyder's unsigned deposition testimony, contained first in plaintiff's supplemental brief and reiterated later by Jacobson's counsel at oral argument (A 487-88). Unfortunately, Judge Weinfeld accepted and repeated verbatim plaintiff's mischaracterization of Mr. Snyder's testimony, which he apparently coupled with plaintiff's misinterpretation of the notations on the advertisement (A 543-45). However, the notations do not have any antitrust significance, and there was no such deposition testimony as to any complaint by Berger.

In reference to these notations Mr. Unger, one of the authors, stated on his deposition and in his affidavit that the notations did not relate to Jacobson's price levels. Rather, his handwritten comments reflected his reaction to the advertisement in two respects. First, Armstrong's prices to its contractors are highly confidential for the reason that non-Armstrong contractors would be in an advantageous position to bid against Armstrong contractors if they knew what Armstrong contractors paid. Yet Jacobson in 6,000 advertisements had published Armstrong's prices for the whole industry to see. Anticipating the bidding advantage to non-Armstrong contractors, Mr. Unger was therefore annoyed (A 313-14; Unger Dep. 116-117). Second, in Unger's view, the advertisement was deliberately worded so as to convey the impression that Jacobson had received special price breaks from Armstrong on new products, when, in reality, Jacobson was getting rid of old inventory. As a result Mr. Unger thought that other Armstrong contractors would think that Armstrong was giving Jacobson special price breaks not available to them (A 313; Unger Dep. 116-117).*

Mr. Snyder testified that two Armstrong Philadelphia contractors, Union Wholesale and Berger, having received the advertisement in question in the mail, showed it to Walter Koenig, a sales representative in Armstrong's Mid-Atlantic Regional Office, and that Berger told Koenig it was "concerned about the publication of the Armstrong pricing, for one thing, and the special prices at which materials were to be sold." (Snyder Dep. 116). Mr. Snyder then testified that his response to Walter Koenig was that "it was evidently an inventory clearance price," and that he did not ask Mr. Koenig to do anything at all in connection with the remarks of the two contractors (Snyder Dep.

* It is noteworthy that Mr. Wiley testified that the memorandum was not discussed at the March 18 meeting at Armstrong's Saddle Brook Office, at which the decision was reached to terminate Jacobson (Wiley Dep. 56).

117). Mr. Snyder's subsequent remarks about the "inventory clearance price" clearly show that what he intended by his previous use of the phrase "special prices" was reference to the fact that Berger believed Jacobson was receiving special price breaks from Armstrong, and not that Berger or any other Armstrong contractor was concerned with the fact that Jacobson was discounting Armstrong products. Indeed, Mr. Snyder had previously testified that he had never received any complaints from Berger about Jacobson (Snyder Dep. 84).*

Nevertheless, in its briefs below, plaintiff represented to the Court, and the Court apparently accepted its representation, that Mr. Snyder had testified that "Berger complained to Armstrong about Jacobson's discount sales . . ." (A 544). Clearly, the issuance of the preliminary injunction should not be allowed to rest on one misconstrued memorandum and testimony wrenched wholly out of context and misrepresented.

(c) The Atlanta Bid

The final item upon which the District Court focused in deciding to issue a preliminary injunction concerned a bid in February 1976 for the installation of ceilings in a federal office building in Atlanta, Georgia, and the fact that Jacobson was terminated as a contractor three weeks later. The only documentary evidence relating to Atlanta was a contemporaneous, internal Armstrong memorandum recording in full, step by step, exactly what happened, regarding Jacobson's bid (A 399). This memorandum is consistent in all respects with the descriptions of the incident contained in the Unger affidavit and in the

* In addition, Mr. Snyder stated in his affidavit and on his deposition that he had no part in the Jacobson termination decision and that he did not even learn of the termination until after the fact (A 410-11; Snyder Dep. 86).

deposition testimony of Messrs. Unger and Wiley (A 314-16; Wiley Dep. 57-59; Unger Dep. 132-138).

As the memorandum states (A 399), Jacobson initially gave Armstrong a choice regarding the Atlanta bid, saying that Armstrong did not have to quote it if Armstrong did not wish to, in which event Jacobson would quote competitive products. Given that choice and expecting Jacobson to use the knowledge of Armstrong's price only to win the bid against Armstrong bidders by quoting non-Armstrong products, Armstrong responded that it preferred not to quote Jacobson on the Atlanta project.* Jacobson then demanded a quotation. Armstrong thereupon provided Jacobson with its off-list price quotation for the Atlanta job, and as Armstrong anticipated, Jacobson used this knowledge to bid competitors' products against contractors bidding Armstrong products and won the award on this basis.

Plaintiff would make much of the circumstance that the Atlanta situation occurred but three weeks before the March 19, 1976 termination. However, it is undisputed that Armstrong personnel had begun to call for Jacobson's termination as early as spring, 1975, a full year prior to the Atlanta bid, and that the termination was much discussed for months prior to March of 1976 (A 346, 547; Wiley Dep. 19; Unger Dep. 38-39, 43-44). Furthermore, Mr. Unger testified that the Atlanta situation was not even mentioned at the March 18 meeting at the Saddle Brook office, wherein the termination decision was reached (Unger Dep. 138).

The above is the only factual evidence about Atlanta. In all respects and from whatever view, the circum-

* Of course, it is of no legal consequence whatever if in the course of recognizing Jacobson's right to sell in Atlanta, Armstrong expressed a view that, given a choice, it would prefer that Jacobson did not. *Beverage Distributors, Inc.* v. *Olympia Brewing Co.*, 440 F.2d 21, 30-31 (9th Cir.), *cert. denied,* 403 U.S. 906 (1971); *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398, 406-07 (2d Cir.), *cert. denied,* 393 U.S. 938 (1968).

stances recounted in this evidence are free from illegality under the antitrust laws. Thus, as was shown to be the case with plaintiff's other two charges of antitrust impropriety, plaintiff's third charge, supported only by surmise and contradicted by all the factual evidence, also cannot support the issuance of a preliminary injunction.

To summarize, in the District Court Jacobson set forth three channels of Armstrong's supposed restrictions upon Jacobson's conduct as an independent business entity in the resale of Armstrong products: Jacobson's sales into Philadelphia in 1970-72, its wholesaling and the Atlanta bid. Each rests on the most meager, if any, of factual support in the face of strong factual showings to the contrary and an overwhelming showing of Armstrong's entirely valid business reasons for terminating Jacobson. The simple fact is that plaintiff has not raised serious or substantial questions as to any antitrust violation. Try as plaintiff may to twist the facts of this case to fit those of *Interphoto Corp.* v. *Minolta Corp., supra,* where, in defiance of elementary antitrust law, territorial restrictions were written into the distributorship contract and the manufacturer blatantly policed the prices charged by its distributors, here there is not a scintilla of proof, direct or circumstantial, of any resale restriction.* Because the record overwhelmingly reflects a lawful unilateral refusal to deal, the decision below should be reversed. *E.g., House of Materials, Inc.* v. *Simplicity Pattern Co.,* 298 F.2d 867 (2d Cir. 1962); *Bay City-Abrahams Bros., Inc.* v. *Estee Lauder, Inc.,* 375 F. Supp. 1206 (S.D.N.Y. 1974); *Plastic Packaging Materials, Inc.* v. *Dow Chemical Company, supra.*

* Moreover, because Minolta also competed with its dealers as a distributor, as well as being a manufacturer, the Court there found the distributorship agreement to constitute a horizontal agreement in restraint of trade. 295 F. Supp. at 720 n.4. Here, in contrast, as discussed *infra* at pp. 29-31, there is not a shred of evidence as to any joint action on a vertical level.

2. *There Is No "Contract, Combination or Conspiracy"*

Even assuming *arguendo* that plaintiff could have shown that Armstrong acted to restrict the resale of its products, plaintiff would not have shown the existence of an antitrust violation. There is not a shred of evidence as to the existence of any "contract, combination or conspiracy." *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 365 F. Supp. 1073, 1093 (D.N.J. 1973), *rev'd in part on other grounds,* 521 F.2d 1230 (3d Cir. 1975).

Having admitted time and again that it did not acquiesce in *any* of the territorial restrictions it claims Armstrong tried to place upon it (*e.g.,* A 30), Jacobson cannot show the requisite joint action through an "agreement" between Armstrong and Jacobson. *E.g., Albrecht* v. *Herald Co.,* 390 U.S. 145, 150 n.6 (1968); *Quinn* v. *Mobil Oil Co.,* 375 F.2d 273, 276 (1st Cir.), *petition for cert. dismissed,* 389 U.S. 801 (1967). Furthermore, having failed to show that any other contractor was restricted in any way or that there was any scheme involving Armstrong and its distributors, Jacobson cannot show the requisite joint action through an overall plan of distribution between Armstrong and its distributors. *E.g., United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960); *Quinn* v. *Mobil Oil Co., supra.*

Thus, contrary to footnote 12 in Judge Weinfeld's opinion, we submit that plaintiff was required to show a conspiracy between Armstrong and a third party. There being no showing at all in this regard in the record, plaintiff, as a matter of law, has not raised substantial questions as to a violation of Section 1 of the Sherman Act. *E.g., House of Materials, Inc.* v. *Simplicity Pattern Co., supra; Quinn* v. *Mobil Oil Co., supra; Walker Distributing Co.* v. *Lucky Lager Brewing Co.,* 323 F.2d 1, 8 (9th Cir. 1963), *cert.*

denied, 385 U.S. 976 (1966); *Tripoli Co.* v. *Wella Corp.,* 286 F.Supp. 264, 266, 268 (E.D. Pa. 1968), *aff'd,* 425 F.2d 932 (3d Cir.), *cert. denied,* 400 U.S. 831 (1970).

The only conspiracy plaintiff alleges in its complaint is between Armstrong and Berger.* However, there is no evidence of any conspiracy between Armstrong and Berger in the record, except for plaintiff's flagrant mischaracterization and pulling out of context of Mr. Snyder's testimony regarding Berger's comments about the Supply Center. As shown at pp. 25-26, *supra,* his testimony, when fully and accurately quoted, negates any hint of conspiracy.

Indeed, even assuming *arguendo* that Mr. Snyder testified that Berger complained about Jacobson's discount prices, which he did not, such testimony would still be insufficient to show the requisite joint action for a Sherman Act Section 1 violation for two reasons. First, such a complaint followed by a refusal to deal, without more, has been held insufficient to show the requisite joint action. *Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.,* 523 F.2d 668, 675 (9th Cir. 1975); *Plastic Packaging Materials, Inc.* v. *Dow Chemical Co., supra; Interphoto Corp.* v. *Minolta Corp., supra,* 295 F.Supp. at 719 n.3; *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.,* 289 F. Supp. 584 (S.D.N.Y. 1968). *See also Beverage Distributors, Inc.* v. *Olympia Brewing Co., supra.*

In *Carbon Steel,* Judge Tyler granted summary judgment for defendant in the face of evidence of conspiracy virtually identical to that set forth by Jacobson. The Court made short shrift of such facts, holding as follows:

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* Interestingly, although plaintiff requested that it be able to depose three of Armstrong's employees prior to the hearing of its motion, it never asked the Court to permit it to depose Berger, the only alleged co-conspirator.

> A combination violative of Section 1 of the Sherman Act cannot be implied from the fact that some of Wood's customers complained of Carbon Steel's practices, since it was the normal working of the marketplace for them to have done so. 289 F. Supp. at 588.

And, in *Plastic Packaging Materials, Inc.* v. *Dow Chemical Co., supra,* Chief Judge Lord held that when the only evidence of conspiracy is complaints to a manufacturer about a distributor from other distributors, such evidence does not meet the "stringent burden" required to succeed on a motion for a preliminary injunction (327 F. Supp. at 228).

Second, as summarized above, Armstrong has presented strong, unequivocal proof as to the lack of any such conspiracy. The denial of a conspiracy under oath requires the denial of a motion for a preliminary injunction based upon claimed violations of Section 1 of the Sherman Act. This is true even if the denial is made in the face of strong conflicting evidence to the contrary, as opposed to the present situation where there is no evidence to the contrary. *Deltown Foods, Inc.* v. *Tropicana Products, Inc.,* 219 F. Supp. 887, 891 (S.D.N.Y. 1963).

In short, here there is no evidence whatsoever of any type of joint action. For this reason alone, Jacobson did not raise serious or substantial questions as to any antitrust impropriety, and accordingly, the lower court order should be reversed.

B. Jacobson Failed to Show Irreparable Injury.

Whatever the burdens on an applicant for preliminary injunctive relief with regard to a showing of probable success on the merits, it is settled, most recently and explicitly by *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, Dkt. No. 76-7095 (2d Cir., May 17, 1976), slip op. at 3757-3758, that for the second or *Hamilton Watch* branch of the *Sonesta* test to be satisfied, the applicant must show, at a minimum, that it will be irreparably injured in the absence of a preliminary injunction *and* that the balance of hardships tips sharply in its favor. *See also Proetta* v. *Dent,* 484 F.2d 1146, 1149 (2d Cir. 1973). In this case the burden on Jacobson to show irreparable injury was imposed by statute, 15 U.S.C. §26, as well as fundamental equitable principles.

To meet this burden more is required "than a mere showing that the party seeking relief will see its relative position deteriorate." *Sanders* v. *Air Line Pilots Association, International,* 473 F.2d 244, 248 (2d Cir. 1972). The injury that must be shown, to be irreparable, must be such that it "cannot be adequately redressed by a monetary award. . . ." *Hudson Tire Mart, Inc.* v. *Aetna Casualty and Surety Co.,* 518 F.2d 671, 675 (2d Cir. 1975). *See also Merrit* v. *Libby, McNeil & Libby, supra,* at 1313-1314; *American Brands, Inc.* v. *Playgirl, Inc.,* 498 F.2d 947 (2d Cir. 1974).

> "The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson* v. *Murray,* 415 U.S. 61, 90 (1974),

quoting *Virginia Petroleum Jobbers Association* v. *FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958) (footnote omitted).

Here again the District Court misapplied the law in this Circuit, *e.g., American Brands, Inc.* v. *Playgirl, Inc., supra,* at 949-950, by focusing its inquiry not so much on Jacobson's insubstantial showing of irreparable injury as on the degree to which Armstrong might be harmed by a preliminary injunction. While part of the analysis on an application for a preliminary injunction may include determining the balance of hardships, the balance is struck between "possible and likely *irreparable* injury to [the movant], and a lack of likelihood of *irreparable* injury to the [defendant] if the preliminary injunction is granted." *Dino DeLaurentiis Cinematografica, S.p.A.* v. *D-150, Inc., supra,* at 377 (emphasis supplied). *See also Hudson Tire Mart, Inc.* v. *Aetna Casualty and Surety Co., supra,* at 673; *Interphoto Corp.* v. *Minolta Corp., supra,* 295 F. Supp. at 724. Thus it is clear that, before the balance of hardships becomes material, the applicant must make the threshold showing of irreparable injury that *Triebwasser* and its precursors require. Such conclusions as the District Court made about Jacobson's potential injury were plainly inadequate.

Judge Weinfeld surmised that Jacobson might be placed at "some competitive disadvantage" by the loss of Armstrong products because Armstrong products are "often required in architect's specifications" and because "[a]lmost all Jacobson's major competitors are Armstrong distributors" (A 551). Armstrong's affidavits, never contested on this point by Jacobson, established that on virtually all jobs of the sort to which Jacobson now limits its bids, the ceiling specifications allow for use of at least two and usually more competitive products (A 318). More-

over, of the 5-8% of all jobs, including the large number of small and intermediate jobs on which Jacobson no longer bids, for which the ceiling products of one manufacturer are specified, the architect in about two-thirds of such instances will permit substitution of a comparable product at the contractor's request (A 317-318). In addition, Jacobson, as the District Court found, deals in and bids the comparable products of all of Armstrong's competitors (A 552). Indeed, Jacobson's own papers reflect that, despite repeated conclusory claims of the importance of Armstrong products to its business, its revenues for 1975 were $12 million while its purchases of Armstrong products were only $600,000 (A 26, 38).*

All else aside, however, that Jacobson may be put at "some competitive disadvantage" is no basis for concluding that it has been injured in a manner which cannot be compensated by a monetary award and that it requires equitable relief *pendente lite.* The District Court's assertion that such equitable relief is necessary on the sole ground of a supposed difficulty in "precise calculation in dollars and cents" of whatever damage Jacobson may sustain from its "competitive disadvantage" flies in the face of this Court's recent pronouncements that the "broad latitude in establishing proof of damages" allowed plaintiffs in antitrust cases makes equitable relief on this ground unwarranted. *Triebwasser & Katz* v. *American Telephone & Telegraph Co., supra,* slip op. at 3758-3759; *SCM Corp.* v. *Xerox Corp., supra,* at 360, 363. *See also American Brands, Inc.* v. *Playgirl, Inc. supra,* at 950.

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* Indeed, Jacobson has never even claimed that its termination as an Armstrong contractor forecloses its acquisition of Armstrong products. In connection with its application for a stay, Armstrong brought to the District Court's attention that Jacobson has recently been acquiring Armstrong products through a local Armstrong contractor (A 559). Jacobson has never denied this.

The District Court's ground for suggesting that Jacobson's termination "could result in immeasurable harm" is equally defective. Relying on *Interphoto Corp.* v. *Minolta Corp., Bergen Drug Co.* v. *Parke, Davis & Co.,* and *McKesson and Robbins, Inc.* v. *Charles Pfizer & Co.,* all *supra,* the District Court concluded that loss of Armstrong's line at Jacobson's Supply Center "would jeopardize plaintiff's good will and its position as a full line, full service supplier, and the risk that its customers will turn to competitors who do have access to Armstrong as well as other products is substantial and could result in immeasurable harm" (A 552). Neither the cases relied on nor the record support the District Court's speculation on this ground.

In each of those three cases, the plaintiff to whom the defendant manufacturer ceased selling its goods was a wholesaler which sold the products of numerous manufacturers to retail outlets for resale, in those cases retail druggists and camera dealers. In each case the plaintiff established and the court found that customers with whom the plaintiff had an on-going business relationship would cease doing business of any kind with the plaintiff in order to buy their requirements in the products of *all* manufacturers, not just of the defendant, from other competitive wholesalers who carried a full line which included the defendant's products.

But Jacobson's affidavits never once even *hinted* that its termination as an Armstrong contractor would injure it in this manner. The reasons are obvious from the record. To begin with, the nature of the ceiling systems contracting business is such that a contractor has no established group of customers, but rather obtains different customers for single jobs by bidding against other contractors. So far as Jacobson's Supply Center is concerned, there is no claim that Jacobson has any established customers, whether re-

tailers or otherwise, who make repeated periodic purchases of the products of several manufacturers, still less that those who purchase at the Supply Center need the access to the broad range of products which retailers of the sort involved in *Interphoto, Bergen Drug* and *McKesson and Robbins* required to service retail customers. Nor is there the slightest suggestion in the record that, as the District Court supposed, there are *any* "full-line, full-service" suppliers to whom those who buy at Jacobson's Supply Center could turn to obtain all their requirements from a single source. Thus it is apparent that whatever "good will" may be involved in Jacobson's business is not the sort which the courts thought worthy of equitable protection *pendente lite* in *Interphoto, Bergen Drug* and *McKesson and Robbins.* Any damage to Jacobson from its termination as an Armstrong contractor is clearly of the "loss of profits" variety which does not warrant the protection of a preliminary injunction. *American Brands, Inc.* v. *Playgirl, Inc., supra,* at 950-951. *See also Interphoto Corp.* v. *Minolta Corp., supra,* 417 F.2d at 622. Finally, "[t]he injunction granted below would in effect give the [plaintiff] substantially the ultimate relief [it] seek[s] . . . before there has been any trial of the issues and where the district court has not found that there has been a showing of probable success on the merits." *Triebwasser & Katz* v. *American Telephone & Telegraph Co., supra,* slip op. at 3759.

Jacobson's failure to show irreparable injury requires reversal of the order below. To be sure, whenever a manufacturer terminates a dealer which carries its products and those of competitive manufacturers, some injury to the dealer will occur from the loss of sales to customers whose brand loyalty is immutable. However, in all but the rare case such injury will be fully compensable by an award of money damages. Unless the rule of law is to become that *no* termination by a manufacturer can take effect until

approved after a full trial on the merits, the fundamental equitable requirement of irreparable injury must be respected. The failure of the District Court to do so here requires that its order be set aside.

Conclusion

The order of the District Court should be reversed.

Respectfully submitted,

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